



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CIVIL CASE NO. 190 OF 2010**

**NATIONAL OIL CORPORATION OF KENYA LIMITED ..... PLAINTIFF/APPLICANT**

**VERSUS**

- 1. SOMKEN PETROLEUM COMPANY LIMITED**
- 2. JULIA MUTUMBI**
- 3. FABIAN LIJOODI** (Sued as the legal representatives

of the Estate of the late **ISAAC MUTUMBI LIJOODI**

**4. BRIAN LIJOODI ..... DEFENDANTS/RESPONDENTS**

**RULING**

The applicant, National Oil Corporation of Kenya Ltd filed the **Chamber Summons** application dated 7/12/2010 seeking the following substantive order:-

**THAT this Honourable Court be pleased to grant a mandatory injunction compelling the Defendants either by themselves, their agents, servants, successors or assigns to hand over possession of service station known as Kakamega Highway Station on property known as Kakamega Town Block 1/551 pending the hearing and determination of this suit.**

The applicant's case is set out on the grounds set out in the application and the affidavit in support sworn by **Jude Ochieng** on 7/12/2010. By an asset purchase agreement dated 30/5/2008 between the applicant and the 1<sup>st</sup> Respondent, **Somken** Petroleum Co. Ltd (**hereinafter Somken**), the applicant purchased from **Somken** various assets comprising mainly of petrol stations set out in the agreement. Part of the assets purchased included the Assignment of Lessee over **Kakamega Town Block 1/551 (hereinafter suit property)** which the 1<sup>st</sup> applicant operated a petrol station.

The applicant, the 1<sup>st</sup> Respondent (**Somken**) and the owner of the suit property, the late **Isaack Mutumbi Lijoodi** executed a Deed of Assignment of Lease. Under the said deed, **Somken** assigned all its rights, benefits and obligations over its lease with the late **Isaack Mutumbi Lijoodi** to the applicant. The applicant's complaint is that contrary to the terms of the agreement, **Somken** and the 2<sup>nd</sup>, 3<sup>rd</sup> Respondents who are the legal representatives of the estate of the late **Isaack Mutumbi Lijoodi** have failed to hand over the said property to the applicant. It is further averred that the 4<sup>th</sup> Respondent is currently the one running and managing the petrol station either on his own behalf or on behalf of the estate of the late **Isaack Mutumbi Lijoodi**.

The applicant's contention is that the Agreement and the Assignment of Lease are clear and unambiguous and it has already paid the Kshs. 24,884,405.14 upon the assignment of the lease. According to the

applicant, the assigned lease provided for a renewal of the lease for a further term of ten (10) years upon notice of such renewal being given by the lessee at a yearly rent to be agreed between the parties. The applicant's view is that if the Respondents are not compelled to hand over the petrol station, the applicant will suffer great prejudice and irreparable harm and damage that cannot be compensated in monetary terms.

**Somken (the 1<sup>st</sup> Respondent)** did not file any papers in opposition to the application.

The 2<sup>nd</sup> Respondent, **Julia Mutumbi** and the 3<sup>rd</sup> Respondent, **Fabian Lijoodi** who are sued as the legal representatives of the estate of the late **Isack Mutumbi Lijoodi** did not also file any papers in opposition in the application.

The 4<sup>th</sup> Respondent, **Brian Lijoodi** in opposition to the application swore a replying affidavit on 17/12/2010. In the said affidavit, the 4<sup>th</sup> Respondent has averred that he is already in occupation of the petrol station which is the subject matter of this suit and that orders of injunction cannot lie against a party who is already in occupation, operation and management of the same. According to the 4<sup>th</sup> Respondent, a mandatory injunction is a main relief and would determine the suit and cannot be allowed at this stage. The 4<sup>th</sup> Respondent described the Respondents as strangers to the agreement between the applicant and **Somken** and stated that the deed of assignment of lease over the said property was to affect only the three (3) years remaining of the agreement dated 19/3/2003. The 4<sup>th</sup> Respondent criticized the lease agreement relied on by the applicant as a forgery and stated that **Somken** was in breach of the lease agreement between it and the late **Isack Mutumbi Lijoodi**.

According to the 4<sup>th</sup> Respondent, **Somken** defrauded the applicant by entering an agreement with them when they knew **Somken** had no possession of the suit premises.

During the hearing of the application, counsel for the applicant reiterated their written submissions. The 4<sup>th</sup> Respondent's counsel relied on their replying affidavit.

I have considered the application, the affidavits and the written submissions filed.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed no papers in opposition to the application. They are deemed not opposed to the application. There is no dispute in respect of the existence of the asset purchase agreement between the applicant and **Somken (1<sup>st</sup> Respondent)**. However, the 4<sup>th</sup> Respondent has contended that the lease agreement relied on by the applicant did not provide for a renewal of the lease for a further term of ten years.

The 4<sup>th</sup> Respondent termed the signature of the deceased on the second agreement as a forgery. According to the 4<sup>th</sup> Respondent, the lease relied on by the applicants was prepared and registered alongside the existing lease which had not yet expired. The 4<sup>th</sup> Respondent has disputed the signature of the deceased and also disputed that the firm of **Ms. P.K. Kamau & Co. Advocates** had an office in Nairobi as stated in the lease agreement relied on by the applicant.

**Clause No. 3 (r)** of the assigned lease dated 10/5/2003 (annexture "JRO 2") provided as follows:-

**“Should the lessee desire to obtain a further lease of the premises at the expiry of the term hereby granted and shall signify such desire by notice in writing to the Lessor not less than THREE (3) MONTHS before expiration of the said term then the Lessor shall on or before the expiration of the said term grant to the Lessee a new Lease of premises for a further term of TEN (10) YEARS at a yearly rent to be agreed between the parties hereto but otherwise subject to the same covenants stipulations and provisions as are herein contained excluding this present provision for renewal.”**

The late **Isack Mutumbi Lijoodi** entered into the lease agreement as the lessor and the landlord which

expression included his heirs, administrators and assigns. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent as heirs and/or administrators of the estate of the late **Isaack Mutumbi Lijoodi**, are therefore bound by the terms and conditions of the assigned lease.

On the allegations of forgery of the signature of the late **Isaack Mulumbi Lijoodi** no evidence has been adduced in support of the same. There is no report of any investigations carried out by the police in respect of the alleged forgery. There is also no affidavit evidence from the firm of **M/s P.K. Kamere & Company Advocates** to confirm whether they had offices in Jubilee Insurance building, 1<sup>st</sup> floor, Nairobi.

There is also no affidavit evidence from **Somken (1<sup>st</sup> Respondent)** disputing whether it was paid the Kshs.24,884.405.14 or whether Somken was in possession of the premises or not.

The 4<sup>th</sup> Respondent has not revealed to this court when and how he came into possession of the suit property. The assertion by the 4<sup>th</sup> Respondent that he is in occupation of the premises and managing the petrol station is rather puzzling seeing that he has not questioned the 1<sup>st</sup> lease agreement which is still in existence.

The principles to be considered by the court in granting a mandatory injunction were set out in the case of **Magnate Ventures Ltd –vs- Eng Kenya Limited – C.A. Civil Application No. 280 of 2009 Nbi (2009) e KLR.**

Where the cases quoted excerpts from **Vol. 24 Halsbury’s Laws of England 4<sup>th</sup> edition paragraph No. 948** which reads as follows:-

**“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff.....mandatory injunction will be granted on an interlocutory application.”**

The court can grant a mandatory injunction at an interlocutory stage where there is existence of special circumstances and in clear cases.

I am satisfied that there are special circumstances to warrant grant of a mandatory injunction in the case at hand. The acts of the 4<sup>th</sup> Respondent are clearly intended to steal a march from the applicants. The assignment of lease is binding to the 4<sup>th</sup> Respondent and for avoidance of doubt that 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent.

Consequently, I allow the application for grant of a mandatory injunction in terms of prayer No. 3 of the application.

Costs to the applicant.

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**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Kakamega this 18<sup>th</sup> day of April 2013.

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**SAID J. CHITEMBWE**

**JUDGE**